

*a*

NEOH KHOON LYE

v.

TRANS-INTAN SDN BHD

*b*

HIGH COURT MALAYA, PULAU PINANG

TEE AH SING J

[CIVIL SUIT NO: 22-132-2001]

12 APRIL 2002

*c*

**CONTRACT:** *Building contract - Set-off - Whether right of set-off could be excluded by express words or by implication - Whether claim for set-off proper and not premature - Whether plaintiff entitled to set-off liquidated damages due to him against final progressive payment due to defendant*

*d*

**CIVIL PROCEDURE:** *Injunction - Mandatory injunction - Application for delivery of vacant possession of land - Balance of convenience - Whether damages an adequate remedy - Whether there was a serious issue to be tried - Whether case so “unusually sharp and clear” that injunction should be granted*

*e*

This was an application by the plaintiff, who had entered into a sale and purchase agreement (‘the agreement’) for property (‘the property’) with the defendant, for delivery of vacant possession of the same. The defendant had demanded the final progressive payment due to it before handing over the property; the plaintiff, however, claimed that there were liquidated damages due to him as a result of the delay in the completion of the property and he was entitled to set-off the liquidated damages against the final progressive payment due to the defendant. The defendant then averred that the plaintiff had to make payment of the full purchase price of the property before he was entitled to vacant possession. The main issue of contention in this case was whether from the wording of the agreement, there was an express provision to exclude the right of set-off, or it could be implied that the parties had intended to exclude the right of set-off.

*g***Held:***h*

[1] The agreement did not provide that payment of liquidated damages by the defendant was conditional upon full payment of the purchase price nor did it by necessary implication prohibit a set-off of liquidated damages against the balance of the purchase price. (p 428 e)

*i*

[2] Although the common facilities were still not completed to date, the plaintiff’s right of action for damages for breach of contract accrued on

the date of the breach; therefore, the plaintiff's claim for set-off was proper and not premature. (p 430 a-b)

*a*

[3] The plaintiff's right to liquidated damages was a cross-claim which arose out of the same transaction as the defendant's right to be paid the balance of the purchase price and was so closely connected with it that it would be manifestly unjust to disregard it; the plaintiff had an equitable right of set-off against the final claim of the defendant. (pp 430 i & 431 a)

*b*

[4] Although the plaintiff had settled all outstanding amounts due to the defendant and was without dispute the legal and beneficial owner of the said property, the defendant was nevertheless withholding delivery of vacant possession of the said property to coerce the plaintiff to pay out monies without taking issue of the set-off of the liquidated damages into consideration. (p 432 d-e)

*c*

[5] The balance of convenience lay in favour of the plaintiff; there would be little, if any, hardship caused to the defendant if the injunction was granted. Damages was not an adequate remedy in this case, and the issue of whether the plaintiff had a right of set-off in respect of the liquidated damages due to the plaintiff was a serious issue to be tried. This was a fit and proper case to grant the mandatory injunction as the plaintiff's case was "unusually sharp and clear". (p 432 f-h)

*d*

*e*

*[Application allowed.]*

**Case(s) referred to:**

*Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 (**refd**)

*f*

*Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 (**dist**)

*Gibb & Co v. Malaysia Building Society Bhd* [1982] 1 MLJ 271 (**refd**)

*Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753 (**refd**)

*Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 (**dist**)

*Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345 (**refd**)

*g*

*SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 (**refd**)

*For the plaintiff - Daphne Choy; M/s Choy & Assocs*

*For the defendants - Ong Wee En; M/s Shahrizat & Tan*

*h*

*Reported by Suresh Nathan*

*i*

*a***JUDGMENT****Tee Ah Sing J:**

This is an application by summons-in-chambers by the plaintiff for the following orders:

*b*

(i) that the defendants whether by themselves, directors, servants, agents or nominees or howsoever do forthwith deliver to the plaintiff vacant possession of the property known as Parcel No. 3, 19 Floor, Block D, Miami Green, Penang (hereinafter referred to as “the property”);

*c*

(ii) that in the event the defendants fail to deliver vacant possession of the property within fourteen days from the date of the order herein, the plaintiff and/or his servants, agents or nominees shall be entitled to apply reasonable force to enter the said property and the defendants shall be liable for all costs arising therefrom; that the defendants do pay the costs of this application to the plaintiff;

*d*

(iii) that the defendants to pay costs of this application to the plaintiff;

(iv) that there be such further reliefs and/or orders as may be deemed just and necessary.

*e*

By a sale and purchase agreement dated 21 December 1996 entered into between the plaintiff as the purchaser and the defendants as the vendor (“the agreement”) the defendants agreed to sell the property to the plaintiff for the total purchase price of RM225,888.

*f*

The defendants are a housing developer licensed under the Housing Developers (Control and Licensing) Act 1966.

Subsequent to the execution of the agreement the plaintiff settled each and every demand for progressive payment made by the defendants.

*g*

The defendants had *via* their letter of 23 February 2001 to the plaintiff given notice that the final stage of the construction works on the said property had been completed and demanded the sums of RM33,883.20 and RM11,294.40 being the final progressive payment due to the defendants and the stakeholders sum due to M/s Anoop & See respectively under the schedule of payment in respect of the agreement.

*h*

The defendants had *via* another letter of 23 February 2001 to the plaintiff given notice that the defendants were ready to deliver vacant possession of the said property and that the plaintiff was to forward the sums of RM51,729.57 and RM2,300 to the defendants and to Bellevue Bina Sdn Bhd respectively.

*i*

Under cl. 22(1) of the agreement the prescribed date of delivery of vacant possession of the said property is within 36 calendar months of the date of signing of the agreement (21 December 1996) that is on 21 December 1999.

*a*

So the defendants were ready to hand over vacant possession on 23 February 2001. Thus there was a delay of 431 days from 21 December 1999 to 23 February 2001. The plaintiff calculated the liquidated damages due for 431 days as amounting to RM26,673.35. So the plaintiff instructed his solicitors, Choy & Associates, to give notice *via* their letter of 12 March 2001 to the defendants that as at 23 February 2001, a sum of RM26,673.35 was due to the plaintiff as liquidated damages pursuant to cl. 22(2) of the agreement.

*b**c*

Clause 24(1) of the agreement stipulates that the common facilities serving the housing development wherein the said property is located, are to be completed by the defendants by 21 December 1999. As at the time of the defendants' notice of 23 February 2001, the defendants have yet to issue a certificate of completion of the common facilities.

*d*

So there was a delay of 431 days from 21 December 1999 to D 23 February 2001.

Although the delay of completion of the common facilities is still continuing, for purposes of settlement of the final progressive payment the plaintiffs had instructed his solicitors, M/s. Choy & Associates, to give notice *via* their letter of 12 March 2001 that as at 23 February 2001, a sum of RM5,334.67 was due to the plaintiff as liquidated damages for delay pursuant to cl. 24(2) of the agreement.

*e*

The plaintiff after setting off the said sums of RM26,673.35 and RM5,334.67 forwarded *vide* letter dated 12 March 2001 from Choy & Associates, three cheques for the following sums due:

*f*

(a) OUB cheque 018253 for a sum of RM11,294 made out to M/s Anoop & See being the stakeholder's sum;

*g*

(b) OUB cheque 018252 for a sum of RM2,300 made out to Belleview Bina Sdn Bhd being the balance outstanding for an additional package;

(c) OUB cheque 018251 for a sum of RM8,427.15 made out to Trans-Intan Sdn Bhd, the defendants, being the final progressive payment less the liquidated damage due to the plaintiff (RM33,883.20 – [RM26,673.35 + RM5,334.67]).

*h*

The plaintiff instructed his solicitors to enquire *via* their letter of 14 March 2001 when the keys to the said property could be collected.

*i*

- a* The defendants had replied *via* their letter dated 15 March 2001 to Choy & Associates that they were not agreeable to the set-off of the liquidated damage due to the plaintiff against the final progressive payment, and returned the plaintiff's OUB cheque 018251 for a sum of RM8,427.15. The defendants demanded the plaintiff to make full payment.
- b* The plaintiff had on 15 March 2001 instructed his solicitors, Choy & Associates, to write to the defendants to enquire what provisions allowed the defendants to refuse the set-off considering that the liquidated damages were due to him under the agreement. The plaintiff has to date not received a reply to his solicitor's said letter of 15 March 2001. Instead, the defendants has *via*
- c* their letter dated 19 March 2001 projected the subject of liquidated damages as one which requires "a total solution" involving the developer, contractors, architect and purchasers ... .
- The defendants through their letter dated 23 March 2001 demanded payment
- d* from the plaintiff pursuant to cl. 4 and item 3 and 4 in the 3rd schedule under the agreement.
- The Plaintiff through his solicitors' letter dated 27 March 2001 once again sent the said cheque to the defendants. And the defendants *vide* letters dated 27 April 2001 and 2 May 2001 returned the said cheque to the plaintiff. *Vide*
- e* the said letter dated 27 April 2001 the defendants gave notice to the plaintiff under cl. 9(2) of the agreement that in the event that the plaintiff did not make full payment within 14 days from the date of the said letter, the agreement is deemed to have been terminated.
- f* As the defendants refused to accept the plaintiff's said OUB cheque 018251 for the sum of RM8,427.15 the plaintiff paid to the defendant *via* telegraphic transfer the sum of RM8,427.15 on 9 May 2001. However according to the defendants, the plaintiff had on 9 May 2001 made payment by telegraphic transfer into the account of the defendants without the knowledge and consent of the defendants.
- g* The defendants also averred in their affidavits that they accept the breach of the agreement by the plaintiff and intents to terminate the agreement and refund the sum of RM154,754.92 in respect of all payments made by the plaintiff less a sum of 20% from the purchase price and interest charged for late payment pursuant to cll. 8 and 9 of the agreement. The letter of termination and cheque for a sum of RM154,754.92 has been prepared by the defendants and is exhibited as exh. 'HICC8'. And the defendants have intention to send the letter and cheque to the plaintiff. But the defendants are not able to do so because this court had on 17 May 2001 directed that the *status quo*
- h* be maintained until the hearing of encl. 3 on 13 June 2001.
- i*

Both the learned counsels for the plaintiff and the defendants have respectively put in lengthy written submissions and replies. I have perused all the said submissions. I shall now deal with the application before me. *a*

The relevant parts of the agreement are as follows:

4. Schedule of payments *b*

(1) The purchase price shall be paid by the Purchaser to the Vendor by instalments and at the time and in the manner as prescribed in the Third Schedule hereto.

(2) Every notice referred to in the third Schedule requesting for payment shall be supported by a certificate signed by the Vendor's Architect or Engineer in charge of the housing development and every such certificate so signed shall be proof of the fact that the works therein referred to have been completed. *c*

... *d*

7. Time essence of contract

Time shall be the essence of the contract in relation to all provisions of this Agreement.

8. Interests on late payments *e*

Without prejudice to the Vendor's rights under clause 9 hereof, if any of the instalments set out in the Third Schedule hereto shall remain unpaid by the Purchaser at the expiration of the said period of fourteen (14) days, interest on such unpaid instalments or instalments shall commence immediately thereafter and be payable by the Purchaser, such interest to be calculated from day to day at the rate often per centum (10%) per annum. *f*

9. Default by Purchaser and determination of Agreement

(1) If the Purchaser: *g*

(a) fails to pay any instalments payable under clause 4(1) in accordance with The Third Schedule hereto or any part thereof and any interest payable under clause 8; or

(b) commits any breach of the terms or conditions contained in this Agreement or fails to perform or observe all or any of the Purchaser's covenants herein contained; or *h*

(c) before payment in full of the purchase price of the said Parcel, commits an act of bankruptcy or enters into any composition or arrangement with his creditors or being a company enters into liquidation whether compulsory or voluntary; *i*

- a* the Vendor may subject to sub-clause (2) hereof, annul the sale of the said Parcel and forthwith terminate this Agreement and in such an event:
- b* (i) the Vendor shall be entitled to deal with or otherwise dispose of the said Parcel in such manner as the Vendor shall see fit as if this Agreement had not been entered into;
- (ii) the instalments previously paid by the Purchaser to the Vendor, excluding any interest paid, shall be dealt with and disposed of as follows:
- c* (a) firstly, all interest calculated in accordance with clause 8 hereof owing and unpaid shall be paid to the Vendor;
- (b) secondly, an amount to be forfeited by the Vendor as follows:
- d* (i) where up to fifty per centum (50%) of the purchase price has been paid, an amount equal to ten per centum (10%) of the purchase price;
- (ii) where more than fifty per centum (50%) of the purchase price has been paid an amount equal to twenty per centum (20%) of the purchase price;
- e* (c) lastly, the residue thereof shall be refunded to the purchaser;
- (iii) neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise hereunder; and
- f* (iv) each party hereto shall pay its own costs in the matter.
- g* (2) If the Purchaser fails to comply with any of the terms of this Agreement or if any of such unpaid instalments and interest remain unpaid for any period in excess of twenty-eight (28) days after its due date, the Vendor shall give the Purchaser or his solicitors not less than fourteen (14) days' notice in writing by A.R. Registered post to treat this Agreement as having been repudiated by the Purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid, this Agreement shall, at the expiration of the said notice, be deemed to be annulled.
- h*
22. Time for handing over of vacant possession
- i* (1) Vacant possession of the said Parcel to which water and electricity supply are ready for connection shall be handed over to the Purchaser

within thirty-six (36) calendar months from the date of this Agreement;

*a*

- (2) If the Vendor fails to hand over vacant possession of the said Parcel, to which water and electricity supply are ready for connection to the said Parcel, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

*b*

23. Manner of delivery of vacant possession

- (1) Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the Parcel has been duly completed and water and electricity supply are ready for connection to the Parcel and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority and the Purchaser having paid all monies payable under clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the purchaser into possession of the said Parcel PROVIDED THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

*c*

*d*

*e*

- (2) Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession.

*f*

24. Completion of common facilities

- (1) The common facilities serving the said housing development shall be completed by the Vendor within thirty-six (36) calendar months from the date of this Agreement.
- (2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.

*g*

I agree with the contention of the plaintiff that the Court of Appeal decision in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 is distinguishable from the present case as that case does not deal with the issue of set-off.

*h*

The main ground of defence propounded by the defendants is that the plaintiff is not entitled to unilaterally set-off the liquidated damages due to the plaintiff

*i*

*a* against the final progressive payment due to the defendants. The defendants' contention is that pursuant to cl. 23(1) of the agreement the plaintiff has to make payment of the full purchase price of the said property before the plaintiff is entitled to vacant possession.

*b* In *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345, the Supreme Court had held that parties to a building contract may by express words or "by clear implication" provide for the ouster or exclusion of the common law right of set-off; in other words, each case would turn upon the particular wording of the contract. And, in that particular case the Supreme Court did find that the provisions of that governing

*c* PAM-formulated contract showed an implicit intention of the parties to exclude the right of set-off.

Thus, the issue for this court to determine is whether from the wording of the agreement, there is express provision to exclude the right of set-off or it can be implied that the parties had intended to exclude the right of set-off.

*d*

I have perused the whole agreement and in particular cl. 23(1) and I am of the view that the agreement does not provide that payment of liquidated damages by the defendants is conditional upon full payment of the purchase price nor does it by necessary implication prohibit a set-off of liquidated

*e* damages against the balance of the purchase price.

In *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753 His Lordship Edgar Joseph Jr (delivering the judgment of the Federal Court) said:

*f* The essential facts may be shortly stated. The agreement was dated 12 December 1984 and by cl. 18 thereof, it was provided as follows:

18(1)The said building shall be completed by the vendor and vacant possession delivered to the purchaser within twenty-four (24) calendar months from the date of this agreement.

*g* (2)If the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchaser price.

...

*h* In giving judgment for the purchaser, the judge relied heavily on the Malaysian Privy Council decision in *Loh Wai Lian v. S.E.A. Housing Corporation. Sdn. Bhd.* [1987] 2 M.L.J. 1. It follows that the point of central importance to this appeal is whether the present case is governed by the judgment of the Privy Council in *Loh Wai Lian*, as the judge thought.

*i*

And His Lordship said:

It is obvious from the judgment of the Privy Council in *Loh Wai Lian* that but for the unusual language of cl. 17 of the contract of sale, which had provided a formula for the computation of damages payable by the developer to the buyer for delay, by defining not merely the *terminus a quo* (the opening date) required under r. 12(r) of the 1970 Rules but also the *terminus ad quem* (the closing date) – not required under r. 12(1)(r) – the case would have been differently decided, for their Lordships said this (at p. 4):

If the question is asked ‘in the absence of such an express provision when would the purchaser’s right of action for damages for breach of contract accrue?’ the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered.

In our view, for the reasons stated *Loh Wai Lian* is, therefore, readily distinguishable from the present case and accordingly, the judge was, with respect, wrong in holding that it was of decisive importance to the question which arose for decision.

It follows, therefore, that our answer to the crucial question aforesaid is: because the agreement by cl. 18(2) had provided for a formula for the calculation of liquidated damages which defined the *terminus a quo* (the opening date) but not the *terminus ad quem* (the closing date), the purchaser’s right of action for damages for breach of contract – following the general rule – accrued on the date of the breach which, in this case, was the day after the time limited under cl. 18(2) for the delivery of vacant possession, that is to say, on 12 December 1986. Accordingly, the purchaser, having commenced proceedings only on 31 July 1993, was more than seven months out of time. We are thus driven to the inevitable conclusion that the purchaser’s claim was statute-barred under the provisions of s. 6(1) of the Limitation Act 1953.

The learned counsel for the defendants relies on the case of *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 to support the argument that as the common facilities are not completed yet, the plaintiff’s claim is premature in that the full sum of liquidated damages due to the plaintiff cannot be ascertained, and hence the cause of action has yet to arise.

It is clear that the Federal Court has in *Insun Development Sdn Bhd v. Azali Bakar* (*supra*) distinguished the decision in *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1. I am of the view that the case of *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* (*supra*) has no application to the present case before me.

- a** Although the common facilities are still not completed to date, the plaintiff's right of action for damages for breach of contract – following the general rule – accrued on the date of the breach which, in this case, was the day after the time limited under cl. 24(1) for the completion of the common facilities; that is to say, on 22 December 1999. So I am of the view that the claim of the plaintiff for set-off was proper and not premature.
- b**

In *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; ([1992] CLJ (Rep) 305); His Lordship Suffian LP (delivering the judgment of the Federal Court) said:

- c** Three issues arises before us in the appeal:
- (1) Is clause 32 of the agreement valid?
- (2) If so, was the learned Judicial Commissioner right in holding that the acute shortage of cement, etc; did not come within clause 32 such that the defendant is not liable for the delay? And
- d**
- (3) Did the plaintiff in withholding payment of the last instalment due commit breach of the Agreement?

And His Lordship said:

- e** As regards the third issue we are of the opinion that the plaintiff did not breach the agreement when she withheld payment of the money demanded by the defendant.
- ...
- f** The plaintiff's cross-claim and the defendant's claim arises out of the same transaction and are closely connected with each other. The plaintiff's cross-claim is so closely connected with the defendant's demand that it would be manifestly unjust to allow the defendant to enforce payment without taking into account the plaintiff's cross-claim.
- g** There has been a delay of 431 days in the delivery of vacant possession of the said property.
- The liquidated damages under cl. 22(2) of the agreement amounted to RM26,673.35. As at the time of the defendants' notice of 23 February 2001, the defendants have yet to issue a certificate of completion of the common facilities. For the delay of 431 days the liquidated damages under cl. 24(2) of the agreement amounted to RM5,334.67.
- h**
- The plaintiff's right to liquidated damages is a cross-claim which arises out of the same transaction as the defendants' right to be paid the balance of the purchase price and is so closely connected with it that it would be manifestly unjust if I were to order that the plaintiff should pay over to the defendants
- i**

the sums of RM51,729.57 and RM2,300 without taking into account the amount of liquidated damages due to the plaintiff amounting to RM33,883.20.

**a**

I am of the view that the plaintiff has an equitable right of set-off against the final claim of the defendants.

The plaintiff after setting off the said sums of RM26,673.35 and RM5,334.67 forwarded *vide* letter dated 12 March 2001 from Choy & Associates, three cheques for the following sums due:

**b**

(a) OUB cheque 018253 for a sum of RM11,294 made out to M/s Anoop & See being the stakeholder's sum;

**c**

(b) OUB cheque 018252 for a sum of RM2,300 made out to Belleview Bina Sdn Bhd being the balance outstanding for an additional package;

(c) OUB cheque 018251 for a sum of RM8,427.15 made out to Trans-Intan Sdn Bhd, the defendants, being the final progressive payment less the liquidated damages due to the plaintiff (RM33,883.20 – [RM26,673.35 + RM5,334.67]).

**d**

By the aforesaid action the plaintiff has fulfilled his obligations under the agreement. And I am also of the view that the plaintiff did not breach the agreement when the plaintiff paid the difference of the defendants' claim dated 23 February 2001 less the set-off.

**e**

The defendants have *via* their letter of 15 March 2001 and 19 March 2001 evidenced an intention to repudiate the agreement and refused any longer to be bound by it by refusing to accept the payment tendered by the plaintiff on the ground that the plaintiff has no right to set-off. I am of the view that it was the defendants who wrongly repudiated the agreement by the aforesaid letters.

**f**

The learned counsel for the defendants had submitted that the plaintiff did not aver that he is jobless at present. It was only disclosed subsequently after the defendants raised this issue. The plaintiff has failed to show that he has the means to fulfil his undertaking as to damages. The answer to this can be found in the case of *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 where His Lordship Edgar Joseph Jr J (as he then was) at p. 100 said:

**g****h**

In any event, the court will not generally deny a plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross-undertaking in damages would be of limited or of no value. So, for example, in *Allen v. Jambo Holdings Ltd* [1980] 2 All ER 502 the Court of Appeal held, when granting a Mareva injunction, that a cross undertaking was acceptable from the plaintiffs although he was legally aided. The rationale

**i**

- a* behind this was that questions of financial ability ought not to affect the position in regard to what is the essential justice of the case.

The principles of law in respect of an interim mandatory injunction are succinctly set out in the case of *Gibb & Co v. Malaysia Building Society Bhd* [1982] 1 MLJ 271.

- b* I agree with the submission of the plaintiff that so long as the strata title to the said property has not been issued, the plaintiff would be unable to deal with or dispose off the said property without the consent or knowledge of the defendants. The plaintiff has paid to the defendants the full purchase price of the said property less the liquidated damages due to him.

- c* The plaintiff would also be put to the expense and inconvenience of paying the full sum of the final progressive payment while the defendants would be allowed to remain indebted to the plaintiff indefinitely in respect of the liquidated damages.

- d* I also agree with the contention of the plaintiff that while the plaintiff has settled all outstanding amounts due to the defendants and he is without dispute the legal and beneficial owner of the said property, the defendants are nevertheless withholding delivery of vacant possession of the said property to coerce the plaintiff to pay out monies without taking the issue of set-off of the liquidated damages into consideration.

- e* This application is urgent as the defendants have by their conduct shown their intention to terminate the agreement and refused any longer to be bound by it notwithstanding that the plaintiff has paid to the defendants the full purchase price of the said property less the liquidated damages due to him. I find that the balance of convenience lies in favour of the plaintiff. On the other hand, there will be little, if any, hardship caused to the defendants if the injunction is granted in that the defendants would have to do little more than to hand the keys to the said property over to the plaintiff. Damages is not an adequate remedy in this case.

- f* The issue of whether the plaintiff has a right of set-off in respect of the liquidated damages due to the plaintiff is a serious issue to be tried.

- g* I am of the view that the defence of the defendants that the plaintiff has no right to set-off will ultimately fail in the trial of this case. The plaintiff's case is "unusually sharp and clear" which is a fit and proper case to grant the mandatory injunction.

- h* In view of the aforesaid, I granted orders in terms of prayers (i), (ii) and (iii) of the application.

- i*